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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 306.

LYDIA BRADLEY,
Plaintiff in Error,
vs.
H. W. LIGHTCAP,
Defendant in Error.

} Error to Supreme Court of Illinois.

Equity Case

BARNARD & WILLIS PRINT, CHICAGO.

27059

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PLEADINGS.

Plaintiff in error filed her bill in chancery in the Circuit Court of Fulton County May 26, 1902, to establish her title to 680 acres of land in Mason County, Illinois, and to remove a cloud therefrom, and for injunction and general relief. Defendant in error demurred generally and specially. October 17, 1902, said Circuit Court sustained the demurrer, and plaintiff, abiding by her bill, the court dismissed the bill for want of equity. Plaintiff in error appealed to the Supreme Court of Illinois, where the decree of the lower court was affirmed April 3, 1903. This record is brought here upon writ of error under Section 709 of the Revised Statutes. This suit involves the same land and presents in considerable part the same facts and federal questions as case No. 243, on the present docket, which is a writ of error to review a judgment of the Supreme Court of Illinois affirming a judgment at law in ejectment in favor of defendant in error, Light-

cap, against Mrs. Bradley, plaintiff in error, and as case No. 343, also on the present docket, which is an appeal from the decree of the Circuit Court for the Northern District of Illinois, dismissing for want of jurisdiction a bill in equity brought by the present plaintiff in error against the defendant in error in that court. This present bill seeks to establish appellant's title to land in her possession, and to remove a cloud which, by force of a statute of Illinois, passed after her rights were acquired, and by the construction and application thereof by the courts of Illinois, will, if the judgment of the Supreme Court of Illinois be not reversed, impair her contract rights and deprive her of property without due process of law and deny her the equal protection of the laws.

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ALLEGATIONS OF THE BILL.

The bill herein (Print. Trans., 4 to 17) alleges that plaintiff in error was the owner, June 30, 1867, of a mortgage given by one Breedlove upon 1,200 acres of land in Mason County to secure a debt of $19,616; that Benjamin S. Prettyman bought the land subject to the mortgage; that Prettyman conveyed 680 acres of the land to Absalom McCune, August 13, 1868, and took from him the same day a trust deed on said 680 acres to E. G. Johnson, trustee for plaintiff in error, to secure three notes payable to her, each for $5,000, due one, two and three years after date. Said trust deed contained full covenants of warranty and condition of defeasance upon default in payment of any part of the debt, interest or taxes; that Prettyman then persuaded plaintiff in error to accept said McCune notes in place of the Breedlove notes and give him a release of the Breedlove mortgage upon the 1,200 acres; that McCune never paid either taxes, interest or either of the notes, and in 1871 plaintiff in error sent her agent to look up the 680 acres of land and found the 680 acres of land was swamp, and valued at from $1 to $10 per acre; that the taxes were unpaid since 1868, and McCune had left the state, after having reconveyed his equity of redemption to said Prettyman; that she thereupon took peaceable possession, and afterwards, at the March term, 1872, she filed a bill in the Circuit Court of Mason County, Illinois, in March, 1872, against said Prettyman, McCune and all others interested in said land, to set aside said release of said Breedlove mortgage for fraudulent representations, and

to foreclose, not only upon the 680 acres of swamp, but upon the 520 acres of valuable land, and for general relief; that said bill was contested by Prettyman, and resulted in a decree of foreclosure and sale of the McCune trust deed upon the 680 acres only; that at the foreclosure sale she bid in the property for $10,000, leaving about $20,000 of her debt unsatisfied; that the time allowed to the mortgagor or his grantees for redemption from said sale expired October 27, 1880, and that of judgment creditors on January 27, 1881, and no redemption or effort to redeem was made, and she was then and thence continued in uninterrupted, actual, exclusive, adverse possession, by her tenants, hostile to all the world besides, and has thence hitherto continued and still continues in such possession; that in the meantime she had continued in possession, had rented and inclosed the lands and made such use of it as the nature of the land would permit, and paid all the taxes as they became due; that after the expiration of the period of redemption of the mortgagor, and prior to the commencement (in July, 1895) of the ejectment suits hereinafter mentioned, she, relying on her complete and absolute right and title in and to said 680 acres of land, improved the land by complete drainage, erection of suitable farm buildings and fences, and reduced the land to cultivation, thereby increasing its value to $65 per acre; that she so spent for drainage about $5,000, for buildings about $5,000, and current taxes over $5,000; and she has, by her tenants, remained in actual, open, visible and exclusive possession of said 680 acres of land continuously since November, 1871, to the present time, and still remains in such possession; and that she has all said time been and is in such possession as owner, claiming to be

the owner in fee thereof; that on June 11, 1894, the heirs at law of Johnson, trustee in said mortgage deed (then deceased), by deed of conveyance conveyed said lands to complainant; that afterwards, on the 30th of November, 1894, there was placed on record in the recorder's office of Mason County aforesaid, a quitclaim deed of said 680 acres from said Prettyman to defendant in error, Lightcap, bearing date September 4, 1893, which was taken with full notice of the rights and possession of plaintiff in error, and without actual, valuable or real consideration, and that said Lightcap is contriving how he may deprive plaintiff in error of her said property under color of a certain statute of the State of Illinois, approved March 22, 1872, in force July 1, 1872, and is subjecting and causing her to be subjected to the deprivation of her rights, privileges and immunities in and to said lands, and her property and vested rights therein, secured by the constitution and laws of the United States and by the constitution and laws of Illinois, by a certain action of ejectment and proceedings thereon and means hereinafter set forth; and that said deed from said Prettyman to said Lightcap is a cloud upon her title, and is being used by him in order to accomplish such deprivation; that on the 13th day of July, 1895, defendant in error sued in ejectment in the Circuit Court of Mason County the tenants of plaintiff in error in possession of said land, claiming to be the owner in fee; that said cases were consolidated and plaintiff in error admitted to defend, and a change of venue taken to Fulton County, where the trial was had, resulting in judgment for plaintiff in error. But this judgment was reversed and the cause remanded by the Supreme Court of Illinois at its October term, 1898, and after two rehearings the opinion of the Supreme Court was filed, October 19, 1900,

as the same is reported in Volume 186, Illinois Reports, at pages 510 to 536, which is made a part of this bill by reference, and the main portions thereof are set out in the bill.

That the question in controversy in said litigation was the construction and effect of said statute of 1872, Sec. 30, Ch. 77, Rev. Stat. Ill. (set out in full below); that the statute thus construed as divesting her of right and title to said premises by reason of her failure to take out a deed on the certificate of purchase was enacted after the date of her trust deed, at which date the statute of 1845 was in force in Illinois, and by that statute there was no time limited within which a holder of a certificate of purchase must take out a deed.

That said Supreme Court of Illinois, in construing and applying said statute, have given it an *ex post facto* effect, contrary to the Federal Constitution, and have given force and effect to the language of said statute, which annuls the title vested in plaintiff in error, so that she is unable longer to defend said actions at law.

That by the law of the land, as established by the decisions of courts of last resort, at the date of her mortgage contract, and which became a part of her contract, she was the real owner and became vested with absolute title upon breach of condition, while the mortgagor had only an equity of redemption; and upon the expiration of the period of redemption the mortgagor's title was extinguished, and thereafter he could not question the title and right of possession of plaintiff in error; that said statute of 1872, as so construed by the Supreme Court of Illinois, if enforced against her, does and would impair the obligation of her contract and deprive her of her rights and remedies, contrary to Section 10 of

Article 1, and to Section 14 of Article 2 of the Federal Constitution; and that the same purports to annul said certificate of purchase, and, as construed and applied by the Supreme Court of Illinois in this case, is not a mere limitation law, but is a law professing and attempting to deprive your oratrix of and terminate the vested right and title which she had on January 28, 1881 (when the period of redemption had fully expired), and thence thereafterwards, and that as so construed and applied by said Supreme Court, this would deprive her of her property without due process of law, contrary to the 14th Amendment of the Federal Constitution.

That upon the next trial of said ejectment cases, after and under said remanding order, plaintiff in error failed to prove that she had secured a deed from the master in chancery, as provided by said statute, and the court, applying said statute of 1872, as so construed by said Supreme Court, instructed the jury to find, and the jury accordingly did find, her guilty, and that defendant in error was the owner in fee of the land, and thereupon judgment was entered against her in accordance therewith.

That thereupon she took a new trial under the practice of said state, and said cause stands for trial *de novo* at the next May term of said Circuit Court; that she is unable to present any other or further defense or proof of her title than as herein alleged, and under the said ruling of said Supreme Court of Illinois, construing and applying said act of 1872, to deprive her of her vested property and contract right, the result of such trial must necessarily be adverse to her, and result in a judgment, unless relief herein be granted, and defendant Lightcap be enjoined from the further prosecution of said suit; and she is about to lose her said property beyond recov-

ery, unless the prosecution of said ejectment cases is enjoined.

The prayer is that defendant, Lightcap, be required to convey, and for injunction against defendant in error forbidding him from asserting ownership, from entering or taking possession or dispossessing complainant, and alternatively that he be enjoined from further prosecuting said ejectment suit; and that said deed of Prettyman to defendant in error be given up and surrendered for cancellation and be declared a cloud on the title of plaintiff in error, and plaintiff in error's title established and confirmed. (Print. Trans., 5-17.)

The purport of the ruling of the state court denying her relief was: That the title and right of possession herein asserted by plaintiff in error, acquired under the said mortgage deed, breach of condition thereof, possession by her, the foreclosure decree and sale and the failure of the mortgagee or his grantee to redeem, were divested or defeated by virtue of a statute of Illinois, enacted after her mortgage was given, and after she had taken the possession upon breach of condition, for the reason that she had, as the court holds, failed to take out a master's deed within the time limited by said statute; and that the mortgagor or his grantee, whose right and title, but for said statute, had become extinct, had, by virtue of said statute, become vested with the title in fee simple, absolute, without any redemption or payment.

The provision of the statute of 1872 in question is that relating to deeds of masters in chancery on foreclosure sales, and reads as follows:

> "When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled

to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within two years from the time this act shall take effect. When such deed is not taken within the time limited by this act, the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed." Approved March 22, 1872. In force July 1, 1872. (Rev. Stat. Ill., Chap. 77, Sec. 30.)

The provision of law as to the issue of master's deeds upon foreclosure sales, which was in force when the mortgage in question was made, and thence until the enactment of said statute of 1872, was as follows:

> "If such lands or tenements so sold shall not be redeemed, as aforesaid, either by the defendant or such creditor, as aforesaid, within fifteen months from the time of such sale, it shall be the duty of the sheriff or other officer who sold the same, or his successor in office, or his executors or administrators, to complete such sale, by executing a deed to the purchaser." (Rev. Stat., 1845, Chap. 57, Sec. 22, p. 304; Gross' Statutes, 1869, p. 381.)

The statute as to redemptions then in force was that mentioned in *Bronson* v. *Kinzie*, 1 How., 311, and is set out at pages 6, 7-8 and 15 in our brief, in case No. 243, on the present docket, and between the same parties. It provided in substance that it should be lawful for the mortgagor of any lands sold under decree for the sale of

mortgaged lands, or his grantees, to redeem the same within twelve months from such sale by paying to the purchaser or to the officer who sold the same the amount bid, together with interest at 10 per centum, from the time of the sale, and it provided that "and on such sum being made, as aforesaid, said sale and the certificate thereupon granted shall be null and void." (Rev. Stat. 1845, Ch. 57, Sec. 13; Gross' Stat. 1869, p. —.)

There was, prior to the said statute of 1872, no law prescribing any limitation of time within which a master's deed should be taken out. In *Rucker* v. *Dooley*, 49 Ill., 377, which was decided after the mortgage in question was made, the Supreme Court of Illinois, created a limitation of twenty years, *ex debito justitiae, for taking out a sheriff's deed on execution sale upon a judgment, which it held applicable as against a purchaser who was never in possession, and in favor of a bona fide purchaser in possession.* But that ruling would not apply to limit or affect the right of a mortgagee purchasing at a master's sale under foreclosure and in actual and rightful possession.

Questions Involved.

These are shown by the following contentions of plaintiff in error:

1. We maintain that the statute of 1872, as construed and applied by the courts of Illinois, as aforesaid, impairs the obligation of the mortgage contract in question, and the contract rights of plaintiff in error, contrary to Section 10 of Article 1 of the Constitution.

2. That by the said statute and by the action of the courts of Illinois in construing and applying the same, as aforesaid, plaintiff in error is deprived of her property

by the State of Illinois, without compensation and without due process of law, in violation of the 14th Amendment to the Constitution.

3. That the State of Illinois, by said unconstitutional statute, and by its courts in construing and applying the same, and by the judgment of its court about to be entered for that purpose, at the suit of defendant in error and on his application, and by the writ of ejectment for that purpose about to be awarded and issued at the said suit and request of defendant in error to dispossess her of her land, now in her peaceable and rightful possession, is about to deprive her of her property without due process of law, contrary to said 14th Amendment. And she seeks in this suit to establish and to protect therefrom her title and right and prevent such deprivation.

4. That the State of Illinois, by the judgment of its courts in ejectment and by the People's writ of ejectment to be issued therein, at the suit of defendant in error, under color of some change in the law of Illinois, made either by statute or by change in the rule of decision, or both, after the rights of plaintiff in error became vested, is about to deprive her of her property without due process of law, contrary to said 14th Amendment.

5. Under the law in force when the contract was made, and which was a part of the contract, the sale and certificate of purchase thereupon issued would become null and void only upon redemption within the time prescribed; but by this statute of 1872 they are made void at the end of five years after the expiration of the period of redemption, without any redemption or payment whatever, if the mortgagee purchaser (although in possession) fails to get a master's deed; and so her contract rights are impaired.

6. Under the law, which was a part of this contract, the mortgagee in possession after condition broken was the real and actual owner in fee, having the *jus in re* as well as the *jus ad rem*. The mortgagor only had an equitable right to redeem. By the decree and sale under decree the time within which this right to redeem might be exercised was limited to twelve months from the sale. Upon the expiration of said twelve months after the sale, the mortgagor's right to redeem was forever barred; but by this later statute the mortgagee purchaser's estate is divested and the mortgagor given the entire estate in fee without redemption or payment.

7. If said statute of 1872 be held unconstitutional or inapplicable to affect her rights under her mortgage, or if it were given a construction within constitutional limits, as a statute of limitations,—for instance, that unless the master's deed be taken within the time limited no deed shall be thereafter issued,—plaintiff in error can maintain her bill, and was entitled to the relief prayed. She had a vested equitable title from and after January 27, 1881, as *cestui que trust*, under the mortgage trust deed, as purchaser and certificate holder in possession, absolutely entitled to a deed of the legal title. And she had the legal title by conveyance from the heirs at law of the trustee in the mortgage deed. She is therefore entitled to have the cloud created by Prettyman's deed to defendant in error removed, and defendant in error enjoined from further asserting the said title against her at law.

ERRORS RELIED UPON.

First. The said Supreme Court of Illinois, in and by its said final judgment and decision, erred in holding and adjudging a certain statute of the State of Illinois, to wit: the 30th section of an act entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," approved March 22, 1872, in force July 1, 1872, being Section 30, Ch. 77, of the Revised Statutes of the State of Illinois, to be valid and constitutional with respect to the Constitution of the United States of America, and particularly with reference to Section 10, Article 1 of said Constitution, and in not holding said statute of the State of Illinois, as construed and applied by the Supreme Court of Illinois in and by its said final judgment, unconstitutional and void under said section of the Constitution of the United States of America.

Second. Said Supreme Court of the State of Illinois erred in rendering its said final judgment in this, that said statute of the State of Illinois (more particularly described in the last foregoing assignment), as construed and applied to complainant's said mortgage contract, made and entered into prior to the enactment of said statute, by the said final judgment and decision of said Supreme Court of the State of Illinois, impairs the obligation of said contract, contrary to the provisions of the Constitution of the United States of America.

Third. The said Supreme Court of Illinois, in render-

ing its said final judgment and decision, erred in holding and adjudging a certain statute of the State of Illinois, to wit: the 30th section of an act entitled "An act in regard to judgments and decrees and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," approved March 22, 1872, in force July 1, 1872, being Section 30, Chapter 77 of the Revised Statutes of the State of Illinois, to be valid and constitutional with respect to the Constitution of the United States of America, and particularly with reference to Section 1, Article 14, being the Fourteenth Amendment of said Constitution, and in not holding said statute of the State of Illinois, as construed and applied by the said Supreme Court of Illinois, in and by its said final judgment, unconstitutional and void under said section of the Constitution of the United States of America.

Fourth. The said Supreme Court of the State of Illinois erred in rendering its said final judgment in this, that said statute of the State of Illinois (more particularly described in the last foregoing assignment), as construed and applied by the said Supreme Court of the State of Illinois, in and by its said final judgment, deprives complainant of her property without due process of law, contrary to the provisions of the Constitution of the United States of America.

Fifth. That said Supreme Court of the State of Illinois erred in rendering its said final judgment in this, that the said Lydia Bradley is thereby deprived of her property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States of America.

Eleventh. The said Supreme Court of the State of

Illinois erred in rendering its said final judgment, in this, that in and by said final judgment, applying to complainant's said mortgage contract the law of the land as now established by judicial decision in the State of Illinois, and refusing to apply and enforce the remedies existing under the laws of the land in the State of Illinois at the date of complainant's said mortgage contract, the obligation of her said mortgage contract is materially impaired, contrary to the Constitution and laws of the United States of America.

Twelfth. The said Supreme Court of the State of Illinois erred in not sustaining and in overruling the first assignment of error made by appellant upon the record in said court, to wit: The court erred in sustaining said demurrer and dismissing complainant's bill.

Thirteenth. The said Supreme Court of the State of Illinois erred in not sustaining and in overruling appellant's second assignment of error made upon the record in said court, to wit: The court erred in not overruling said demurrer and requiring defendant to answer.

BRIEF.

I.

The law of the land, at the time the contract in question was made, as recognized and enforced by the courts, providing means of enforcement of contracts, became a part of the contract the same as though included in its terms; and the statute of 1872, changing such law, after plaintiff in error's contract was made and title vested thereunder, as such law has been here construed and applied by the State Court, is a law impairing the obligations of her contract, and is obnoxious to Section 10, Articel 1 of the Constitution of the United States.

Tennessee v. *Sneed*, 96 U. S., 69.
Edwards v. *Kearzey*, 96 U. S., 595.
Louisiana v. *New Orleans*, 102 U. S., 203.
Walker v. *Whitehead*, 16 Wall., 314.
Field v. *Brokaw*, 148 Ill., 654.
Barnitz v. *Beverly*, 163 U. S., 118.
Seibert v. *Lewis*, 122 U. S., 284.
Bronson v. *Kinzie*, 1 How., 311 (319).
Gunn v. *Barry*, 15 Wall., 610.
Shapleigh v. *San Angelo*, 167 U. S., 646 (657).
Ogden v. *Saunders*, 12 Wheat., 213 (257).
McCracken v. *Hayward*, 2 How., 608, at 613.

For the purpose of passing upon its constitutionality, as applied to the rights of plaintiff in error here, said

statute must be understood to mean what the court of last resort of the state has construed it to mean.

Bell v. *Morrison*, 1 Pet., 351.
D'Wolf v. *Rabaud*, 1 Pet., 476.
Van Rensellear v. *Kearney*, 11 How., 297.
Tioga R. Co. v. *Blossburg & C. R. Co.*, 20 Wall., 137.
Townsend v. *Todd*, 91 U. S., 452.
Scipio v. *Wright*, 101 U. S., 665.
Wilson v. *North Carolina*, 169 U. S., 586.

II.

The English common law of mortgages was adopted in Illinois. A mortgage is a conditional conveyance of the fee. After condition broken, the title becomes absolute in the mortgagee, who may recover possession as against the mortgagor.

After condition broken the mortgagor has only an equity of redemption. After decree of foreclosure and sale, the right of redemption was limited to twelve months from the sale, and if not exercised within that time, it was barred. *Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 327 (331). The estates in the land remain the same in such case, with the qualification that the amount and time of redemption are absolutely fixed by the decree and sale. *Id.*; *Wedgbury* v. *Cassell*, 164 Ill., 622 (626).

Such was the law of the state as promulgated by the courts of last resort at and before the date of the mortgage contract in question in this case.

Williams v. *Brunton*, 3 Gilm., 600 (622).
Kruse v. *Scripps*, 11 Ill., 98 (104).
Carroll v. *Ballance*, 26 Ill., 9 (16).
Chickering v. *Failes*, 26 Ill., 507 (519).

Nelson v. *Pinegar*, 30 Ill., 473 (481).
Griffin v. *M. Co.*, 52 Ill., 130 (145).
Kenyon v. *Shreck*, 52 Ill., 382 (386).
Kelgour v. *Wood*, 64 Ill., 345 (347, 348).
Oldham v. *Pfleger*, 84 Ill., 102 (103-4).

The right of the mortgagor or his grantees to redeem, after condition broken, is a purely equitable right, the creation of courts of chancery, and can only be asserted in a court of equity.

Kenyon v. *Shreck*, 52 Ill. 382 (386).
Bracken v. *Cooper*, 80 Ill., 221 (231).
Mulvey v. *Gibbons*, 87 Ill., 367 (383).

And so the law of Illinois remained after said date, and still remains and is enforced in cases where said statute of 1872 does not apply to change that rule.

Kelgour v. *Wood*, 64 Ill., 345 (347, 348).
Vallette v. *Bennett*, 69 Ill., 632 (635).
Harper v. *Ely*, 70 Ill., 581 (585).
Oldham v. *Pfleger*, 84 Ill., 102 (103-4).
Davis v. *Conn. Mut. Co.*, 84 Ill., 508 (510).
Mulvey v. *Gibbons*, 87 Ill., 367 (382).
Fitch v. *Wetherbee*, 110 Ill., 475 (487).
Smith v. *Mace*, 137 Ill., 68 (74).
Esker v. *Heffernan*, 159 Ill., 38 (40).
Walker v. *Warner*, 179 Ill., 16 (23).
Ware v. *Schintz*, 190 Ill., 189 (193).
Farrar v. *Payne*, 73 Ill., 83 (88).
Stone v. *Tyler*, 173 Ill., 147 (155).

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III.

The *cestui que trust* in a trust deed after condition broken is in equity the absolute owner of the title, just as at law the trustee is. Consequently, plaintiff in error as *cestui que trust* in the trust deed to Johnson, after breach of condition, was in equity the absolute owner of the title and right of possession, as she would have been at law had she been the mortgagee. And her possession after condition broken was the rightful possession of a mortgagee.

A. & E. Ency. of Law, 1st Ed., Vol. 27, p. 234, and cases cited.
Fountain v. *Bookstaver*, 141 Ill., 461 (466-7).
Kilgour v. *Gockley*, 83 Ill., 109.
Croxall v. *Shererd*, 5 Wall., 268.
Lewin on Trusts and Trustees, p. 674.
Nicoll v. *Walworth*, 4 Denio., 386.
Badgett v. *Keating*, 31 Ark., 400.

IV.

By said law of Illinois, as it existed at the date of the mortgage contract, the equity of redemption and all right whatever in or to said premises of said McCune and his grantee, Prettyman, was barred and determined on the 27th day of October, 1880, at the expiration of twelve months from the date of the sale to plaintiff in error by the express provisions of the decree of foreclosure, and the defendants, McCune and Prettyman and all persons claiming under them since the commencement of the foreclosure suit February 22, 1872, were forever barred and foreclosed from all equity of redemption and claim of, in

and to the said mortgaged premises or any part thereof when the same were not so redeemed by them within twelve months after October 27, 1879.

The final order and decree of the Supreme Court of Illinois in this case, establishing a different rule of law, to wit: that the title of the mortgagor is not completely divested by the foreclosure and sale and expiration of the period of redemption, but survives, and that the title of the mortgaged premises did not become absolute in the trustee for use of plaintiff in error, but that all her right, title and interest ceased January 27, 1886, unless she sooner secured a deed from the master in chancery, and that she is not longer entitled to hold possession as against the mortgagor and his assigns, deprives or will deprive plaintiff in error of the right, title and interest vested in her under the laws of the state as they existed at the date of her mortgage, and when condition was broken, and when she took possession, and when this suit was brought, without due process of law, and violates the prohibition of the 14th Amendment of the Federal Constitution.

Chicago, Burlington & Quincy Railroad Co. v. *City of Chicago*, 166 U. S., 226.

Scott v. *McNeal*, 154 U. S., 34 (45).

Taylor v. *Beckham*, 178 U. S., 548 (599, 605).

Tindal v. *Wesley*, 167 U. S., 204 (222).

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V.

If plaintiff in error, in possession of the land in question, has an equitable title, a court of equity will establish and protect the same and enjoin proceedings at law and direct the cause to proceed in equity, and will remove the cloud or direct a conveyance.

Ruckman v. *Cory*, 129 U. S., 387.
Mills v. *Lockwood*, 42 Ill., 111 (118).
Wilson v. *Byers*, 77 Ill., 76 (84).
Smith v. *Spencer*, 73 Ala., 299.
McKibbin v. *Bristol*, 50 Mich., 319.
Pollock v. *Gilbert*, 16 Ga., 398.
Pierson v. *Ryerson*, 5 N. J. Eq., 196.
Carpentier v. *Montgomery*, 13 Wall., 480.
Barnett v. *Cline*, 60 Ill., 205.
Reed v. *Reber*, 62 Ill., 240.

ARGUMENT.

I.

THE STATUTE OF 1872, AS CONSTRUED BY THE SUPREME COURT OF ILLINOIS, IMPAIRS THE CONTRACT RIGHTS OF PLAINTIFF AN IS UNCONSTITUTIONAL.

1. Because, as so construed, it purports not only to make the certificate of purchase null and void in the hands of plaintiff in error, although she was in the rightful possession of the land, under a complete equitable estate, but also purports to annul the sale itself and her equitable estate thereby acquired, while she contracted for a sale, certificate of purchase and equitable estate, which were not subject to annulment.

2. The statute substitutes the right to a contingent and defeasible estate in such purchaser in possession, after the period of redemption has expired, for the absolute estate for which she contracted.

3. It gives to the mortgagor out of possession, five years after his right of redemption has become barred, the absolute estate in fee simple, without any redemption or payment, while under the law of the contract the purchaser in possession has that estate, and the mortgagor at that time would have no shadow of right whatever as against the purchaser in possession. The statutes condemned in *Bronson* v. *Kinzie*, 1 How., 311; *McCracken* v. *Hayward*, 2 How., 608; *Gantly's Lessee* v. *Ewing*, 3 How., 707; *Howard* v. *Bugbee*, 24 How., 461; *Edwards* v. *Kearzey*, 96 U. S., 595, and *Barnitz* v. *Bever-*

ly, 163 U. S., 118, did not attempt any such drastic impairment of the contract as that.

In determining whether a contract has been impaired, this court ascertains for itself what the contract was, and so what the law of the state was which formed a part of the contract. In determining whether the contract has been impaired by a later statute, the construction of such later statute by the state court is taken.

Barnitz v. *Beverly*, 163 U. S., 118 (122).

The law of Illinois existing when the mortgage contract was made became a part of the contract and created and defined the legal and equitable obligations thereof. This embraced alike those laws which affect its validity, construction, discharge and enforcement. *Bronson* v. *Kinzie*, 1 How., 311 (315); *Walker* v. *Whitehead*, 16 Wall., 314; *Barnitz* v. *Beverly*, 163 U. S., 118.

Under that law the mortgage here conveyed the legal title, and upon condition broken (which had occurred here before this act of 1872 was passed) the mortgagee's title became at law absolute. (See authorities, *supra*, p. 17-18.) The mortgagor or his grantee had then merely the right in equity to redeem by payment of the mortgage debt, which could be asserted only in a court of equity. (*Kenyon* v. *Shreck*, 52 Ill., 382 (386); *Bracken* v. *Cooper*, 80 Ill., 221 (231); *Mulvey* v. *Gibbons*, 87 Ill., 367 (383). The mortgagee in possession had the right to retain the possession until payment and could not be deprived thereof without payment or discharge. *Harper* v. *Ely*, 70 Ill., 581 (585); *Dickason* v. *Dawson*, 85 Ill., 53 (55). By that law, so long as the mortgagee purchaser remained in the possession, her right was not affected by any laches or limitations. *Mills* v. *Lockwood* (1866), 42 Ill., 111 (119); *Parker* v. *Shannon* (1891), 137 Ill., 376 (392-3;

Ruckman v. *Cory*, 129 U. S., 387. The operation of any statute of limitations was suspended by such possession. *Fountain* v. *Bookstaver*, 141 Ill., 461 (468). Under the law of this mortgage contract there was no way in which the mortgagor or his grantee out of possession could ever recover or regain the mortgaged land except by redemption by payment.

The mortgagee, under her mortgage contract, had the right to several remedies; they were cumulative and two or all of them might be carried on concurrently or successively. She might sue at law on the mortgage debt; enter for condition broken or bring ejectment therefor, and prosecute a bill in equity to foreclose the mortgage. *Vansant* v. *Allmon*, 23 Ill., 30; *Rogers* v. *Meyers*, 68 Ill., 92.

Plaintiff in error here pursued two of her remedies concurrently, viz.: (1) She entered upon condition broken and maintained her possession; and (2) she obtained a decree in equity of foreclosure and sale, and herself purchased at the sale for about one-third of the amount due. This remedy of foreclosure in equity was not given by any statute in Illinois, but was the exercise of the inherent jurisdiction of the court of equity. But by statute there was allowed an extension of the period for redemption after the sale (twelve months to the mortgagor or his grantee). By that statute, the purchaser was entitled to receive from the officer making the sale a certificate in writing describing the lands or tenements purchased, and the sum paid therefor, or, if purchased by the mortgagee, the amount of his bid and the time when the purchaser would be entitled to a deed, unless the same should be redeemed as provided in the statute. The statute also required the officer to file a duplicate of the certificate in the office of the recorder of deeds, and declared

that said certificate should be taken and deemed evidence of the facts therein contained. (Rev. Stat. Ill., 1845, Chap. 57, Secs. 12, 24; Gross Stat., 1869, pp. 380, 382.)

It will be observed that under that law the certificate of purchase was only *evidence* of the purchase; and not the purchase itself or essential to its validity. The effective thing was, not the certificate of purchase, but the decree and sale and purchase thereunder, and confirmation of the sale, the expiration of the period of redemption and (superadded in this case) the actual possession.

Under the law which was a part of the mortgage contract here in question, the certificate of purchase so provided for and held by a mortgagee-purchaser in possession could not be in any way annulled, much less could a valid sale itself be invalidated or annulled,—and such purchaser's equitable title, when the time for redemption had expired, was complete and absolute.

When the mortgagor or his grantee had let the period, so allowed for redemption, pass without redeeming, all his right in or to the premises was forever barred and gone. *Smith* v. *Mace*, 137 Ill., 68 (73, 74); *Bozarth* v. *Largent*, 128 Ill., 95 (107, 108); *Burgett* v. *Osborne*, 172 Ill., 227 (238). He then had no interest whatever in the property. (*Burgett* v. *Osborne, supra.*) For that reason it was held that he could not object to any irregularities in the sale by a judgment creditor redeeming from such sale during the following three months allowed him therefor. (*Bozarth* v. *Largent, supra.*) The sale upon the judgment of such redeeming creditor "is of nothing that belongs to him"—the mortgagor. (*Smith* v. *Mace, supra.*)

By the law of the mortgage contract the legal title outstanding in the trustee in the mortgage deed, after the sale, was held in aid of and in trust for the purchaser at the

sale, in case there was no redemption from such sale within the time limited therefor. *Williams* v. *Brunton,* 3 Gilm. (Ill.), 600 (622); *Kruse* v. *Scripps,* 11 Ill., 98 (104); *Farrar* v. *Payne,* 73 Ill., 88. The mortgagor has not any interest therein after his right to redeem has expired. Moreover, in the foreclosure suit here the trustee in the trust deed, Johnson, who held the legal title, was not made a party to the suit. (Print. Tr., 17-26.) The legal title in him, therefore, was not affected by the decree or sale. *Lambert* v. *Hyers,* 22 Ill. App., 616. That legal title was conveyed by his heirs to Mrs. Bradley. (Print. Tr., 8.)

In *Brobst* v. *Brock,* 10 Wallace, 519 (530), this court, speaking of the rule of law in such cases governing the rights and titles of mortgagor and mortgagee, in jurisdiction where the common law prevails, as in Illinois, held that courts of equity, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and that bills to redeem are entertained upon the principle that even when the debt secured by the mortgage has been paid or tendered, the mortgagee still holds the legal title, but holds it for the mortgagor. The court say:

> "It is true that a mortgage is in substance but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Formerly, if the condition was not strictly performed, the estate of the mortgagee, at first conditional, became absolute, and the mortgagor's right to redeem was lost. The estate or interest, though defeasible at its inception, became unconditional on the failure of the mortgagor

to pay the money secured, or fulfil the condition at the time appointed for performance.

"Courts of equity have in modern times relieved against such forfeitures, and, in favor of a mortgagor, have extended the time for redemption. But such courts, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered."

In *Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 327 (331), it was held that the position of the mortgagor, after the foreclosure sale and during the time allowed for redemption "was substantially of a mortgagor, with a right to redeem," while the purchaser at the sale "acquires no new title to the premises until the period of redemption has passed and he is entitled to his deed." The court further said:

"His title becomes absolute only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time."

That was the law of this mortgage contract.

But this statute of 1872, as it is construed by the Supreme Court of Illinois, takes away the legal title vested in the trustee Johnson and vests it in the mortgagor; and it substitutes a contingent or defeasible equitable estate in such purchaser in possession, after the time allowed for redemption has expired, instead of such absolute one for which this mortgagee contracted; and it not only removes the bar of the mortgagor's equity

of redemption, for which plaintiff in error contracted, in case the mortgagor should fail to redeem,—it does not stop with restoring a right in the mortgagor to redeem, but it enlarges such equity of redemption into an absolute estate in fee simple absolute without any redemption or payment whatever. The statute, which in *Bronson* v. *Kinzie* was held to impair a mortgage contract, did much less; it only provided that the equitable right of redemption of the mortgagor should not be immediately extinguished, but should remain for twelve months after the sale. If this statute of 1872 had merely given the mortgagor a further right to redeem by making payment to the purchaser, Mrs. Bradley, after the expiration of five years, in case she had not yet taken out the master's deed, then *Bronson* v. *Kinzie, McCracken* v. *Hayward, Edwards* v. *Kearzey and Barnitz* v. *Beverly* would be express authorities that it would be an impairment of her mortgage contract . How much clearer and more drastic is the impairment by a statute which gives the mortgagor the entire estate free of the mortgage or purchase, and entitles him, without requiring of him any redemption or payment, to eject the purchaser from the possession of the premises after nearly twenty years, during which she has, on the faith of her estate and rightful possession, expended very large sums in making the land valuable and in the buildings and other improvements thereon.

That this result is due to this statute of 1872 in question is shown by the language and reasoning of the majority opinion of the State Court in this case. It says, referring to this statute:

> "The language of this statute is clear and unambiguous. Plainer terms could not have been employed for the purpose of setting bounds to the

rights acquired by a certificate of purchase and limiting them to five years after the period of redemption. The statute was so construed in *Peterson* v. *Emmerson*, 135 Ill., 55. The court, in the absence of express legislation on the subject, had formulated in *Rucker* v. *Dooley*, 49 Ill., 377, an equitable rule, based upon the analogies of the law, and it was urged upon the court that equity might order a conveyance based on a foreclosure sale after the certificate was barred. The court, then speaking by Mr. Justice Baker, said (p. 60): 'But this rule was abrogated by the legislative enactment of 1872, not only in respect to the period of limitation, but also by the provision that if a deed was not taken out within the time limited the certificate should be null and void. It is sticking in the bark to say that, notwithstanding the certificate is null and void, yet the sale which it was given to evidence has such vitality and force that a court may decree, by virtue thereof, the peremptory and absolute transfer by its officer of the property and title of one person to another and different person. Such action on the part of the court is a virtual annulment of the mandate of the statute, and an infringement of vested legal rights.' In that case the purchaser asking relief was in possession. The statute was enacted because the legislature were not satisfied with the limitation fixed by the court in *Rucker* v. *Dooley*, either in respect to the period of eight years and three months or the power of a court to give effect to the certificate after that time, within twenty years. If they had been satisfied with the rule of the court in either respect they would not have changed it in both. The statute fixed the limitation at five years, and abrogated the rule that the purchaser should have any right after that time, by declaring that the certificate should be null and void. The court had not annexed any qualification to its rule respecting possession and no exception on that ground was incorporated in the statute. Some statutes of limitation fix limits for the commencement of actions for the possession of real estate, and one who is in possession is not subject to such limitation, because he could not

bring an action and already has what would be gained by a suit for possession. An argument that such a statute does not apply to one in possession is without force in the construction of a statute like this one. The effect of possession as notice, or as relating to the doctrine of laches in courts of equity, has no relation whatever to the question. * * *

"The statute under which she purchased provided exactly what her purchase should be, what she should obtain by it, within what time she would be entitled to receive the title, and after what time the certificate of purchase would become null and void, and all her rights under the purchase would cease. The statute gave her a right to receive the amount of her bid, with interest in case of redemption, and in case there was no redemption, to receive a deed within five years after the expiration of the period of redemption, and declared that if she did not take out the deed within that time the certificate would be null and void. * * * The statute does not transfer any right or title granted by the certificate of purchase or divest complainant, but it fixes, in definite terms, what she purchased." (Print. Trans., 63-64.)

And again (*id.*, p. 67) the opinion says:

"After the expiration of the period allowed for redemption, the complainant in this case became entitled to a deed, and that right continued for five years, during which time she might have obtained a deed, but when that time expired and her certificate of purchase became null and void, the only ground for holding that she had an equitable title ceased to exist."

The statute of 1872, without doing any violence whatever to its language, might have been held not to be retroactive, and so inapplicable to affect vested rights or rights under mortgages previously made, or the rights of persons in possession of land who had no need of any master's deed. It might have been held applicable only to prevent

the issue of a master's deed, leaving all existing rights unaffected. It might have been interpreted, according to its terms, that it affected only the certificate of purchase (which was only evidence thereof), but not the purchase itself or the decree or the rights of the purchaser in possession. If the statute of 1872 had been so construed as to avoid the constitutional objection, it must have been held to have no application to the plaintiff in error, who was in rightful possession, claiming title under a contract made prior to its passage; or if applicable at all, then that it only applied at most to cut off the particular remedy there limited, viz.: to receive a master's deed.

If this remedy is barred, then the holder of the certificate of purchase could not demand and receive a deed from the master in chancery. But that limitation law would not affect the estate or rights of the purchaser already in rightful possession. (*Mills* v. *Lockwood*, 42 Ill., 111 (119); *Parker* v. *Shannon*, 137 Ill., 376 (392-3); *Fountain* v. *Bookstaver*, 141 Ill., 461 (468). In all other respects, except the mere obtaining of the master's deed, the rights of the holder would remain as they were before. The rights of complainant in error, which were complete without the master's deed, would not be affected by the statute. The equitable title acquired under the trust deed out of which this certificate arose would remain. Having reduced the premises to possession peaceably under said trust deed prior to the enactment of said statute, and rightfully as owner of the equitable title under the law of the land at the time, that right of possession would remain.

This was well expressed in the dissenting opinion of Mr. Justice HAND in this case (Trans., 76-77):

> "The statute requiring a deed to be taken out within five years from the expiration of the period

> of redemption is a limitation law, and nothing more, and as a limitation law it is undoubtedly constitutional and valid. (*Ryhiner* v. *Frank*, 105 Ill., 326.) The same rules of construction must therefore be applied to this statute that the courts have heretofore applied to statutes of limitation in general, and the law is well settled in this state that statutes of limitation do not run against a party while in possession of land. (*Mills* v. *Lockwood*, 42 Ill., 111; *Wilson* v. *Byers*, 77 *id.*, 76; *Parker* v. *Shannon*, 137 *id.*, 376.) In *Parker* v. *Shannon*, *supra*, the court said: 'A statute of limitation or rule of limitation in equity does not run against a possessor of real estate, but it runs against him who is out of possession. (*Mills* v. *Lockwood*, 42 Ill., 111.) * * * To hold that said statute has the effect to divest the appellant of her equitable estate, she being in possession, and to invest the appellee with that estate, he being out of possession, would render it more than a limitation law, and make it obnoxious to both the state and federal authorities.'"

It appears from the opinion of the majority here that they appreciated the force of this constitutional objection, expressed in the minority opinion, and in their effort to avoid it they emphasized it by invoking a rule which, as applied to the facts of this case, sustains our contention and the position so taken by Mr. Justice Hand, and not the conclusion in the majority opinion. Let us see:

It will be borne in mind that defendant in error, or his grantor, Prettyman, has never been in possession of the land in question since the five years time limited by the act of 1872 for taking out a master's deed expired, or at any time since plaintiff in error took possession in 1871; but the plaintiff in error, during that time, has been and is in actual and continuous adverse possession. (Trans., 7-8.) This litigation turns upon the question whether, by force of the statute of 1872, considered as a statute of

limitation, defendant in error can eject plaintiff in error from this possession. The majority opinion, in order to sustain the application of the act of 1872 as a sword in the hands of defendant in error to drive plaintiff in error from her possession, says (Trans., 64):

> "When the bar of the statute has become absolute it is just as available for attack as for defense; and in case of disseizin by the paramount owner, the title acquired by the bar may be asserted against him. One having no other title to land except under a statute of limitations may maintain his action against the one who has lost title by the same statute. (*McDuffee* v. *Sinnott*, 119 Ill., 449; *Faloon* v. *Simshauser*, 130 *id.*, 649; *Illinois Central Railroad Co.* v. *Moore*, 160 *id.*, 9.)"

The rule applicable here is that *the statute of limitations cannot be used for purposes of attack, unless the person claiming under it has been in actual possession of the land under it after the time prescribed by the statute, has become complete.* In *McDuffee* v. *Sinnott*, which is cited by the court, the rule is stated as follows:

> "Whenever the bar of the statute has become absolute, *and the party entitled is in possession under it*, it is thereafter just as available for attacking as for defensive purposes, and its availability in this respect will not depend at all upon the occupant continuing in the actual possession of the property." (119 Ill., 452.)

The rule is stated in the same language in *Illinois Central Railroad Co.* v. *Moore*, 160 Ill., 9, 16, which is also cited in the majority opinion. In *Paullin* v. *Hale*, 40 Ill., 274, 277, decided in 1866, and cited in *McDuffee* v. *Sinnott*, *supra*, the court say of the effect of a limitation law:

> "Ever since the case of *Newland* v. *Marsh*, 19 Ill., 376, *it has been the settled law of this court that this second section cannot be used as a sword, unaccom-*

> *panied by possession,* and to that rule we intend to adhere. * * * Until the owner of the color of title has united actual possession to the color and to the payment of taxes, he is in no position to invoke the aid of the second section, because *that section cannot become constitutionally operative until the person invoking its aid has acquired actual possession.* Then, for the first time, it properly becomes a limitation law. But when these three things have concurred, then all the incidents of any other limitation law follow, one of which is admitted to be the right to recover a possession temporarily abandoned by the person who has acquired the benefit of the bar. These principles have become rules of property throughout this state, and from them we do not intend to depart."

And to same purport are *Steele* v. *Gellatly*, 41 Ill., 39, 43; *McCagg* v. *Heacock*, 42 Ill., 153; *Hale* v. *Gladfelder*, 52 Ill., 91, and a uniform course of decisions.

The above rule, that a limitation law cannot be used for purposes of attack by one who has never been in possession of land thereunder, was based upon constitutional grounds, following the decision in *Newland* v. *Marsh*, 19 Ill., 376, that the ground upon which limitation laws, when applied to existing rights, are held to be consistent with the constitutional principles here invoked, is that they apply to the remedy only and leave the right untouched. And so the rule was settled and should have been held applicable here (if this statute were to be given a constitutional effect), which is laid down by the court in *Mills* v. *Lockwood*, 42 Ill., 119; *Parker* v. *Shannon*, 137 Ill., 392-3, and other cases above cited by us, that a statute of limitations does not run against or affect a person in possession of real estate, who needs to resort to no remedy, but only against one out of possession.

But it may be said the language of the statute here in

question does not necessarily imply the annulling of any right appertaining to property. It has, however, been so construed and applied by the Supreme Court of Illinois. It could have been construed as a statute of limitations, depriving the holder of the certificate of any further remedies under the certificate after the time limited.

It should have been so construed, by modification of the language of the statute if necessary, so as to give it effect within constitutional limits. Such a thing was done in *Newland* v. *Marsh,* 19 Ill., 376, when the limitation statute expressly declared that the holder of color of title to land, after complying with certain provisions of the statute, "should be deemed the legal owner."

But it may be contended the courts of Illinois are not extending the effect of the *statute* to the mortgage contract, but are merely enforcing the law of mortgages as it exists independently of said statute, when they hold, as stated in the opinion in this case:

> "After condition broken she might have pursued all the different remedies allowed her by law, until satisfaction was obtained by one or the other, but when a decree of foreclosure was entered and the land sold, the security had been appropriated towards the satisfaction of the debt, and all her rights in the land merged in the decree and sale (citing several cases). After the sale the trustee had no title and nothing remained of the indebtedness except the personal liability of McCune. The title that the trustee had was only for the purpose of enforcing the provisions of the trust deed, and that having been done by the court, his powers, rights and duties were at an end. The sale created a new relation, in no manner affected by the fact that complainant had been the party secured by the trust deed, but dependent upon the statute, which permitted any person to become the purchaser, and admitted all bidders on terms of absolute equality." (Trans., pp. 64-65.)

> "The title must remain in the original owner until it passes out of him by the execution of the deed; and this is a title for all beneficial purposes." (*Id.*, 66.)
>
> "Defendant's title is a perfectly valid, legal title, and not a mere cloud to be cancelled and removed." (*Id.*, 68.)

This cannot be done. It is too plain that but for this statute of 1872 plaintiff in error would have been herein held to have an absolute equitable estate in this land. She has that such estate, unless this statute has divested her of it. But for that statute defendant in error, or his grantor, would be held not to have any right, title or interest in this property. If he now has any, it is because this statute has vested it in him.

If the above quotation from the opinion is a statement of the law of mortgages as it now exists in the State of Illinois, and as determined by the courts of last resort in that state, then the law of the land providing the remedies upon mortgage contracts as it existed at the date of the McCune mortgage, and which became a part of said mortgage contract, has been so changed by subsequent decisions of the courts of last resort that it has deprived plaintiff in error of her equitable title which vested in her upon breach of condition of said trust deed under the law as it then stood, which the state courts are prohibited from doing by the Fourteenth Amendment, as we shall endeavor to show under title III.

We desire first to call attention to a few points in the opinion above quoted by which it will appear that these changes are by virtue of this statute and in order to give it effect:

> "After condition broken she might pursue all the different remedies allowed by the law until satisfaction was obtained by one or the other."

These remedies were to reduce the mortgaged premises to possession, peaceably if possible, by ejectment if necessary, and to retain possession until satisfaction of the debt; to sue in assumpsit the mortgage debtor, and to prosecute a bill in equity to foreclose the mortgage. It is admitted plaintiff in error was pursuing two of these remedies concurrently, foreclosing in equity and reducing the premises to possession. But the court continue:

> "When a decree of foreclosure was entered and the land was sold, the security *had been appropriated* towards the satisfaction of the debt, and all her right in the land *merged* in the *decree* and *sale*."

But under the law of this contract her right in the land was not less by reason of the decree and sale than before the decree and sale. If the security had been appropriated, then it belonged to plaintiff in error. If the certificate of purchase conveyed no estate, this must have been accomplished by the confirmation in plaintiff in error of the equitable title she already had, and by the sale of all this to her, subject still to the right of redemption, but with that right now limited to a fixed period. If "all her rights in the land merged in the decree and sale" to herself, clearly she got by the sale more and not less than she had before; and the mortgagor had less.

The trust deed was *evidence* of equitable title and right of possession in plaintiff in error after condition broken. The decree so finds and confirms the title. The *trust deed* is then merged in the decree, and the *decree* becomes evidence of the title. The equitable title is not lost, but protected by the decree. Plaintiff in error could still have recovered in ejectment. (*Esker* v. *Heffernan*, 159 Ill., 38.)

This claim of merger of *title* in a *decree* was made in *Williams* v. *Brunton*, 3 Gilm., 600 (618-22), and the law stated as above.

But the court continue: "After the sale the trustee had no title." (Trans., p. 65.) In *Lightcap* v. *Bradley,* 186 Ill., 510 (525) the same court say that "the title which had been in the trustee was sold by the court," and so, sold to plaintiff in error. It was not sold to the mortgagor. In the next paragraph of the opinion here (p. 66) they say: "The certificate of purchase conveyed no title to complainant." But by the valid sale and the failure to redeem, a complete equitable title passed to the purchaser. The certificate was only evidence of the sale, and not the sale itself. As the title in the trustee was sold to the plaintiff in error, if it did not pass to her, that title remained in aid of her right. Clearly a proceeding to *foreclose* Prettyman's equity of redemption could not *reinvest him* with the legal title.

The idea that because the "title the trustee had was only for the purpose of enforcing the provisions of the trust deed," "that having been done *by the court,* his powers, rights and duties were at an end," and therefore the legal title in him was revested in the mortgagor, is absurd, and never could have been held except as the effect of and because necessary in order to give full effect to this statute of 1872.

The court plainly showed that the effect given to this statute was one to divest titles. "If the title of Prettyman passed out of him at the expiration of the period of redemption, it must have gone somewhere. It was not *in nubilus,* and it did not go to the complainant or any other person." (Print. Trans., 65-66.) The answer to this, under the law which formed a part of this mortgage contract, was clear. The legal title remained in the trustee in the trust deed in trust for the mortgagor if he had redeemed (*Brobst* v. *Brock,* 10 Wall., 530, quoted,

supra; Wedgbury v. *Cassell,* 164 Ill., 626, quoted below), and in aid of the rights acquired by the purchaser at the sale and in trust for her when the period for redemption had expired. (*Williams* v. *Brunton,* 3 Gilm., 622; *Kruse* v. *Scripps,* 11 Ill., 104; *Farrar* v. *Payne,* 73 Ill., 88.) The equitable estate, upon the expiration of the time for redemption, was complete and absolute in the purchaser. The court felt compelled, in order to give effect to this statute, to hold as a result of the statute, that the title or estate was in the mortgagor.

The court further say in the said opinion: "The sale created a new relation in no manner affected by the fact the complainant had been the party secured by the trust deed, but dependent upon the statute, etc." But the relation was necessarily affected by that fact. The mortgagee, who was in possession and entitled to remain in possession until paid, and who was the beneficiary of the decree and sale, necessarily held a different relation from that of a stranger purchasing. For instance, the mortgagee purchasing was required to pay no money (other than for expenses), and the section of the statute prescribing the form of the certificate of purchase recognized this, by providing that if the purchase of the land was by a third person, the certificate should state "the sum paid therefor," while if by the complainant, mortgagee, it should state "the amount of his bid." (2 Starr & Curtis' Stat., p. 2352, Sec. 16.)

What is this new relation? Does buying at her own sale reduce the mortgagee in possession—who has the right to remain in possession until redemption, and has the legal title, absolute at law, and subject only to the right in equity to redeem—to the position of a mere certificate holder out of possession? In-

stead of buying in the land, did she *surrender* her title and right to possession for the certificate of purchase? No; the new relation referred to must be in addition to the former one, the rights of the *holder* of the *equity* of *redemption* being *reduced* to a definite period of redemption, after which all his right would cease.

The Supreme Court of Illinois fully answer this question, as to the nature of this "new relation," in *Wedgbury* v. *Cassell,* 164 Ill., 622 (626), as follows, Mr. Justice CARTWRIGHT delivering the opinion:

> "A new relation and new property were created, but there was a continuation of the same debt with a new creditor, and in the form of a new lien of a like degree and more valuable than the mortgage. In the case of a mortgage, it is necessary to go into court and obtain a decree of foreclosure, while in case of a certificate there is no such requirement, and it is not subject to delay or contest. *The estates of the land remain the same in such case, with the qualification that the amount and time of redemption are absolutely fixed by the decree and sale.* (*Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327.)"

It is a false conception to regard the decree as *functus officio* after sale. The true idea is as expressed in *Cochran* v. *Fogler,* 116 Ill., 194 (199): "The court of chancery is not *functus officio* until the decree is executed by delivery of possession." The true rule is that stated by Mr. Jones in his work on mortgages, Sec. 1660:

> "When the mortgagee purchases the title, according to the doctrine of the common law, the legal title is already in him, and the sale confirms him in the possession of the property; and without a deed from the trustee appointed to make the sale, he can maintain ejectment for the property."

As "the mortgagor still has the estate of a mortgagor" after the sale and during the time allowed for redemp-

tion, "with this qualification, that the amount and time for redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time" (*Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 331), the legal estate in the mortgagee must also remain outstanding after the sale, and if the mortgagee is the purchaser must, upon the termination of the period for redemption and upon failure to redeem, unite with his then complete equitable estate. In *Wedgbury* v. *Cassell, supra,* it was distinctly held that upon decree and sale "the estates in the land remain the same," with the qualification above stated that the amount and time for redemption are fixed.

II.

THE PLAINTIFF IN ERROR WILL BE DEPRIVED OF HER PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT, IF THE JUDGMENT OF THE STATE COURT IS NOT REVERSED.

Under the law of her contract, as we have shown, the plaintiff in error became seized and possessed of a complete equitable estate upon the expiration of the period of redemption in 1881. Under color of said statute of 1872, which can, under the constitution, have no valid application to affect her rights, she is about to be deprived of said property without compensation.

All the considerations urged as before apply here, and it is clear that she is entitled to invoke the protection of the 14th Amendment against said statute, as it has been construed and applied by the state court herein.

III.

THE DECISION OF THE SUPREME COURT OF ILLINOIS IN THIS CASE IS ITSELF OBNOXIOUS TO THE FEDERAL CONSTITUTION, BECAUSE IT MAKES SUCH A CHANGE IN THE LAW OF THE LAND AS TO DEPRIVE PLAINTIFF IN ERROR OF HER EQUITABLE TITLE TO THE LAND IN QUESTION WITHOUT DUE PROCESS OF LAW, AND TO DENY TO HER THE EQUAL PROTECTION OF THE LAW.

Besides giving to the statute of 1872 a construction and effect which makes it obnoxious to the constitution, the state court has, in its decision here, under color of a rule of decision, deprived plaintiff in error of her property and denied to her the equal protection of the law.

What was the law of the land in the State of Illinois as to the title of the mortgagee after condition broken at the date of the McCune mortgage?

Carroll v. *Ballance*, 26 Ill., 9, is considered a ruling case upon this question. Mr. Justice BREESE in that case said (p. 15):

> "The questions presented by this record are: Can a mortgagee, the mortgage debt being payable by installments, for which separate notes are given, recover the mortgage premises in ejectment against the mortgagor, or those claiming under him, when one or more notes are due and unpaid, and without notice to quit to the party in possession, before action brought?"

The English cases are then reviewed at some length, and the conclusion reached is expressed in the following language (p. 20):

> "We think it is settled that a mortgagee may maintain ejectment on condition broken, without notice to quit, and that the condition is broken when

one or more installments are due and unpaid, because the condition being an entirety, it is indivisible, and a failure to pay any part of the debt is a breach of the condition."

In *Chickering* v. *Failes*, 26 Ill., 507 (519), the court said:

"By the mortgage deed the legal title passes to the mortgagee, but in equity the right of redemption remains in the mortgagor, even after the condition broken. But at law, after condition broken, the mortgagee may bring his ejectment and recover possession. The mortgage is a deed of conveyance, with a condition annexed, and purports on its face to convey the title, but the condition authorizes the mortgagor to defeat the title thus conveyed and to reinvest it in himself, by a performance of the condition. After a failure to perform the condition, the title apparently becomes absolute in the mortgagee, and is clearly color of title."

In *Mulvey* v. *Gibbons*, 87 Ill., 367 (382), it is held:

"At the date of the decree (a decree *nisi* in strict foreclosure), and for a considerable time afterward, the property was worth very much less than the amount due of the mortgage debt. The decree determined the rights of the parties, that unless the amount due was paid within thirty days, the defendants should be debarred from all equity of redemption of the premises. There is no pretense of the payment of any part of the money, or of excuse for non-payment, or of any readiness or disposition to pay anything. Why, in reason and justice, should not the right of redemption be barred, as the decree declared?

"The absence of a further order of confirmation was here a lack of but the merest technical form. According to the rule as laid down by Daniell, if the defendants did not pay the money the plaintiff's rights to the property became absolute, though in order to complete his title there must have been a final order confirming it.

"If the plaintiff's right to the property had become absolute, how, before a court of equity, could that consist with any remaining right of redemption in these defendants? Why, in that court, where the real right, regardless of form, is regarded and given effect to, should not such an absolute right, as thus declared, be recognized and asserted?

In *Kenyon* v. *Shreck*, 52 Ill., 383, this court recognize and declare the principle that the right of a mortgagor or his grantee to redeem after condition broken is a purely equitable right, which can be asserted only in a court of equity, and when its assertion would be plainly inequitable, that court will withhold its aid; and that where a defective foreclosure has been had, such equity of redemption will not be permitted to be asserted against an equity still stronger. And see *Hamilton* v. *Lubukee*, 51 Ill., 420; *Munn* v. *Burges*, 70 *id.*, 604; *Bush* v. *Sherman*, 80 *id.*, 160."

Many other quotations to the same effect could be made from authorities cited in our brief.

By the law of the land at the date of the breach of condition in the McCune mortgage, the legal title became vested in the trustee Johnson for use of plaintiff in error. She therefore had a vested equitable title to the land. She was entitled to possession, which she secured without objection. She might have proceeded to acquire the legal title by advertisement and sale, or by foreclosure in equity. She chose the latter course in hope of securing other relief also. She prosecuted her foreclosure to decree and sale, became purchaser and secured a certificate of purchase. Here the effort to secure the legal title seems to have ended, no one knows why.

It is now claimed by defendant in error and decided by the Supreme Court of Illinois that the proceedings to foreclose superseded the authority of the trustee to sell and convey the legal title, and this may be true.

If so, then plaintiff in error can never secure the legal title and must be content with the equitable title she held as *cestui que trust,* and which she has protected by maintaining her possession and by purchasing at the master's sale. This was done in aid of her equitable title, not in derogation of it.

Moreover, under the terms of the decree of foreclosure, it was provided that unless the defendant Prettyman redeemed within the time required by law, the master in chancery should convey said premises to the purchaser at such sale. After the expiration of the period of redemption, therefore, plaintiff in error was entitled, whenever she demanded it, to receive the legal title. She had therefore a perfect equitable title.

By what means is it claimed this equitable title has been divested?

If by the statute of 1872, then the statute is unconstitutional, as we have already seen. It is beyond question that if the statute of 1872 had not been passed, her equitable title would have remained unaffected; and all the mortgagor's right would have remained forever barred and extinguished. It seems, then, that this divestiture of title has then been accomplished by the statute, as construed and applied by the court.

But if this result is brought about by judicial decision, by a change of the views of the courts of last resort, since the date of said transactions, by which the rights secured to her by the law as settled and determined by courts of last resort, when her mortgage was made and her rights became vested, are taken away, then the plaintiff in error has been deprived of her property without due process of law and in violation of her constitutional rights, secured by the 14th Amendment.

A few quotations from the many decisions of this court upon this point will confirm this statement.

In *C., B. & Q. Ry.* v. *Chicago,* 166 U. S., 226, the property of the railroad company was taken for a street, in condemnation proceedings, which were regular according to the statute, but the verdict of the jury and the judgment of the court awarded only nominal damages, $1. This proceeding was alleged to be in contravention of the 14th Amendment, taking property without due compensation. The court said in part:

> "But a state may not by any of its agencies disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment."

And much more is there said, both in the opinion of the majority and in the dissenting opinion, confirming the correctness of the contention we are making in this case, viz.: that if the equitable title once vested in plaintiff in error by the acts of the parties under the law, as then understood and promulgated, it cannot be afterwards divested by a change of judicial holding.

In the case of *Bank of Kentucky* v. *Stone,* affirmed in this court without opinion, May 15, 1899, the charter of the bank exempted it from taxation for a certain time, and the Supreme Court of the State construed the charter as a contract which could not be repealed. Afterwards, however, the same court changed its views and upheld a tax levied against the bank. In the Circuit Court the published opinion seems to indicate that this was the material point in the case, and their opinion hold-

ing that such a change of judicial construction was a violation of constitutional restrictions was apparently affirmed by this court. (88 Fed. Rep., 383.)

In *Ex Parte Virginia,* 100 U. S., 339, the constitutional question arose upon indictment of a county judge for excluding negroes from the jury list, and it was held that his act was in violation of the 14th Amendment, since he represented the state, was clothed with power to act by the state, and through him the state deprived negroes of rights guaranteed by the Constitution. In this case the act was not judicial, but administrative.

In *Scott* v. *McNeal,* 154 U. S., 34, the Federal question was whether the 14th Amendment of the Constitution was violated by a decision of the state court in an action of ejectment sustaining the title of defendant in error, who derived title through an administrator's sale, where it subsequently developed that the person whose estate was administered was not in fact dead. The court said (p. 45):

> "The 14th article of amendment to the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities." (Citing *Virginia* v. *Rives,* 100 U. S., 313, 318, 319; *Ex Parte Virginia,* 100 U. S., 339, 346; *Neal* v. *Delaware,* 103 U. S., 370, 397.

The principle we are illustrating is that plaintiff in error cannot be deprived of her title to this land which had become vested in her, either by the arbitrary act of legislature or decision of the courts of the state, without

due process of law. If the laws of the land vested the title in her at the time, the Supreme Court of Illinois can not now, by arbitrarily denying that the laws did have that effect, divest her title. Such arbitrary exercise of power has been checked wherever it has been attempted.

Yick Wo v. *Hopkins,* 118 U. S., 356.
Henderson v. *New York,* 92 U. S., 259.
Chy Lung v. *Freeman,* 92 U. S., 275.

In discussing this point, the Supreme Court of Illinois, in the opinion attached to the record, say (p. 65):

> "The second proposition is that the complainant has equitable title to the premises through the trust deed, the sale and expiration of the period of redemption, which gave her a right to a master's deed. It is argued that after fifteen months the right of redemption of Prettyman and his creditors was gone, and that right being barred he had no title, but that complainant is the equitable owner, although the certificate became null and void. If the title of Prettyman passed out of him at the expiration of the period of redemption it must have gone somewhere. It was not *in nubibus* and it did not go to complainant or any other person. The certificate of purchase conveyed no title to complainant."

It is not pretended the certificate of purchase carried any title. That passed nothing; it was *merely evidence* of certain facts therein stated, as provided by the statute requiring it. The effective part of the foreclosure was the decree and the sale and the running of the period of redemption; and their purpose and effect, where the mortgagee was the purchaser, were to *foreclose, i. e.,* cut off and bar the equitable right of redemption in the mortgagor and his grantee, Prettyman, the legal title having already passed to Johnson, trustee, and so being out McCune or Prettyman. By such *sale,* when con-

firmed by the court, the purchaser got an incipient interest that might or might not ripen into an absolute estate. (*Bruschke* v. *Wright*, 166 Ill., 191.) And this did so ripen into and become a complete equitable title upon expiration of the redemption period. When the mortgagee, who already held the equitable title, became the purchaser, the effect of all this was to foreclose and bar the equity of redemption. The theory that the certificate of sale was the only right the purchaser got is unsound. The trust deed had already conveyed the legal title to Johnson, upon a condition of defeasance in 1868. Under the law of mortgages, such as prevails in Illinois, courts of equity, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption; and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid. *Brobst* v. *Brock*, 10 Wall., 519 (530). The condition had been broken in 1871 and *then* the title of Prettyman passed to Johnson for use of plaintiff in error, and Prettyman had only the equitable right to redeem. It was not necessary that it should pass again at the expiration of the period of redemption. It was only his equity of redemption which expired then. That did not pass to anybody. It passed away; was foreclosed and barred. The title which *had* passed to the trustee and *cestui que trust* more than ten years before was not affected in any way, except to be freed of any right or risk of redemption.

It is quite a different case when sale is made under a judgment. There the previous mortgage conveyance is wanting and the title is conveyed only by the sheriff's deed. There has been no previous conveyance of the legal title, nor any confirmation of the sale by the court;

and until the time for redemption has expired, the purchaser at a sale or execution "is only regarded as a bidder." *Johnson* v. *Baker*, 38 Ill., 98 (102).

The case cited by the Supreme Court of Illinois in support of their views above quoted is a judgment sale, and yet, even there the Michigan court regard the purchaser and certificate holder as having the whole equitable title, while the judgment debtor had only a naked legal title, after expiration of redemption.

The observations and citations of the Supreme Court of Illinois next following (Trans., p. 66), to the effect that ordinarily the purchaser and certificate holder is not entitled to possession, rents and profits, are no doubt correct. But the mortgagee, who becomes the purchaser, and for a part only of the mortgage indebtedness, is entitled to such rents and profits, as was recognized in *Bogardus* v. *Moses*, 181 Ill., 554 (559, 560). In the case under consideration possession had been secured at a time when plaintiff in error was entitled to it. In the states where the mortgage is regarded, even at law, as a mere security for the indebtedness, and in equity under the English rule as to mortgages (which prevails in Illinois), it is held that the mortgagee has an equitable claim upon the rents and profits in so far as they may be needed to discharge so much of the mortgage debt as cannot be realized out of the corpus of the property. *Hart* v. *Respes*, 89 Ga., 87; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 94 Fed., 269. In the opinion at bar it is not denied that the mortgagee after condition broken may both foreclose in equity and sue in ejectment (p. 64). If he forecloses in equity *only*, the statute gives the right of redemption and he cannot get possession until that expires. But he can concurrently recover possession in

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ejectment, and so get into possession before or after decree of foreclosure. *Esker* v. *Hellerman, supra.*

Moreover, it appears from the very case cited by the Supreme Court of Illinois in the support of their claim that the certificate holder is not entitled to possession, the case of *Whiting* v. *Butler*, 29 Mich., 122, that "one who is entitled to a deed of premises has an equitable right in them." If so, in a case where the purchaser had no previous conveyance, but only a certificate of purchase under a judgment lien, certainly this authority supports our position, that plaintiff in error was, after condition broken, absolute owner of the equitable title as against the mortgagor and all persons holding under him; and after the expiration of the mortgagor's redemption, when plaintiff in error became entitled to a deed upon demand January 27, 1881, she was certainly the owner of the equitable title, and in possession. How, then, can any statute of limitation, or judicial decision of any court, divest that title without due process of law? And the ejectment cases are not such due process of law. *Williams* v. *Brunton, supra.* The case of *Stephens* v. *Ill. Mut. Ins. Co.*, 43 Ill., 327, also, which was decided in 1867, the year before our mortgage was made, sustains our position.

The dissenting opinion of Mr. Justice Hand, in the case at bar, expresses the law upon this point. He says (p. 74):

> "So soon, however, as the right of redemption had expired the appellant became equitable owner of the land with the right to take a deed, which would have vested her with the full title to the land, both equitable and legal, and the grantor of appellee had left remaining in him only the naked legal title to the land, which could have been divested by the appellant at any moment and without any act

being performed by the grantor of appellee. All that was then necessary to complete her full title and ownership was the execution to her of a deed by the master. The master had no legal or beneficial interest in the land. He was simply a conduit through which, by virtue of a deed, the legal title would pass from the grantor of appellee to the appellant. As the grantor of appellee at that time had only the legal title, all the equitable interest in the land was in appellant, and upon uniting the legal title and equitable interest in her by a master's deed, her title would have been consummated and become complete.

In *Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327, the court had under consideration the question whether or not the mortgagor had an insurable interest in the mortgaged property after foreclosure and sale during the time allowed for redemption, and it was said (p. 331):

'At the time of the fire, then, the position of Stephens was substantially that of a mortgagor, with a right to redeem.

That in this position he would have had a substantial, insurable interest does not admit of doubt. His estate, as mortgagor, would not have been lost until the expiration of his right to redeem. In this state the purchaser under a sheriff's sale upon judgment and execution, or at a master's sale on foreclosure of a mortgage, acquires by his purchase no new title to the premises until the period of redemption has passed and he is entitled to a deed. His deed will relate back, it is true, to the beginning of his lien in order to cut off intervening encumbrances, but it will not carry back the absolute divestiture of title, as is evident from the fact that neither judgment debtor nor mortgagor can be called to account for rents and profits. His title becomes absolute only when his right to a deed accrues. If it is a sale under a decree of foreclosure, the mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree and sale, and his estate will be absolutely divested if he fails to redeem within the allotted time.'

The case of *Whiting* v. *Butler*, 29 Mich., 122, is very instructive upon the questions of the respective rights of the judgment debtor and purchaser in premises sold upon execution after the term of redemption has expired. Opinions were filed by four different members of the court. Mr. Justice Cooley, on page 129, says:

'After Drury had become entitled to a sheriff's deed, Campau's title would have been a mere legal title with the whole equitable right in Drury.' And Mr. Justice Campbell, on page 143, said: 'The Drury title became an indefeasible right as soon as the statutory period of fifteen months expired. The interest which Drury obtained by his execution sale was a vested and valuable interest. Though not the legal estate, it was an equitable estate.'

Jones, in his work on Mortgages (Vol. 2, Sec. 1661), in speaking of the rights of parties after sale, says: 'The mortgagor still has the estate of a mortgagor, with this qualification: that the amount and time of redemption have become absolutely fixed by the decree of sale, and his estate will be absolutely divested if he fails to redeem within the allotted time.'

In *Ketchum* v. *Schicketanz*, 73 Ind., 137, it was held that with the expiration of the time allotted for redemption the holder of a sheriff's certificate for land sold on execution or decretal order acquires an equitable estate in the land, of which one-third will pass to the wife upon the bankruptcy of the husband under the statute of that state, which provides that the surviving wife shall have one-third interest in all the lands in which the husband had an equitable interest at the time of his death, and that her *inchoate* interest in his lands shall vest absolutely where the same are conveyed away from him, under judicial proceedings.

In *Wright* v. *Douglass*, 2 N. Y., 373, it was held the interest of a purchaser at an execution sale after the time of redemption had expired becomes an estate subject to sale upon attachment.

It seems clear that the equitable estate in said

lands vested in the appellant immediately upon the expiration of the time allowed for redemption, the naked legal title thereof being in the grantor of appellee. On this title he could maintain ejectment against the appellant, and in case she brought ejectment against him he could defeat her. She, however, at the time his equity of redemption expired, and for many years prior thereto, had been in possession of the land. Whether that possession, during the period of redemption, was so far acquiesced in by the grantor of the appellee as to have made it lawful need not be considered, although at this distant time her possession with his consent might be presumed, but after that period had expired in equity it is clear she was entitled to possession. At least, she being the equitable owner of the estate and in possession, it was not inequitable that she should retain possession as against Prettyman or his grantee, who only had the naked legal title. As was said in *Whiting* v. *Butler, supra* (p. 139):

'His right to a deed had become complete and vested. All he lacked of a legal title to the land, superior and paramount, was the legal evidence such a deed would afford, and his right to this evidence or muniment was not contingent—not dependent upon the will or discretion of any one. It was so complete that it was not necessary for him to resort to equity to obtain it if withheld. The right to it was so plainly and exclusively fixed and legal as to be cognizable at law and enforceable by mandamus' —and in this state the appellant could have obtained the relief by motion. *People* v. *Bowman*, 181 Ill., 421.

Under the repeated decisions of this court it is clear that by virtue of the terms of the statute above referred to, upon the failure of the appellant to take out a deed within the time fixed therein, the certificate of purchase issued to her became null and void, and that no right could be predicated thereon by her. (*Ryhiner* v. *Frank*, 105 Ill., 326; *Peterson* v. *Emmerson*, 135 *id.*, 55; *Belleville Savings Bank* v. *Reis*, 136 *id.*, 242; *Seeberger* v. *Weinberg*, 151 *id.*, 369;

Brown v. *Ridenhower,* 161 *id.,* 239.) The appellant, however, is not claiming any right here by virtue of the certificate of purchase, but being the equitable owner of the premises by virtue of the decree of foreclosure, the sale and the decree confirming the sale, and being in possession of the premises, the question is, should a court of equity permit her to be turned out of possession by one who has only the mere naked legal title to the land?

The statute requiring a deed to be taken out within five years from the expiration of the period of redemption is a limitation law, and nothing more, and as a limitation law it is undoubtedly constitutional and valid. (*Ryhiner* v. *Frank, supra.*) The same rules of construction must therefore be applied to this statute that the courts have heretofore applied to this statute of limitation in general, and the law is well settled in this state that the statutes of limitation do not run against a party while in possession of land. (*Mills* v. *Lockwood,* 42 Ill., 111; *Wilson* v. *Byers,* 77 *id.,* 76; *Parker* v. *Shannon,* 137 *id.,* 376.) In *Parker* v. *Shannon, supra,* the court said (p. 392): 'A statute of limitations or rule of limitation in equity does not run against a possessor of real estate, but it runs against him who is out of possession.' (*Mills* v. *Lockwood,* 42 Ill., 111.) 'The possession is notice to all of the possessor's equitable rights and he need to assert them only when he may find occasion to do so.' To hold that said statute has the effect to divest the appellant of her equitable estate, she being in possession, and to invest the appellee with that estate, he being out of possession, would render it more than a limitation law and make it obnoxious to both the state and federal authorities.

It would seem, therefore, that while the right to a master's deed had been swept away by the statute, the statute had no effect upon the equitable interest of the appellant, accompanied, as it was, by her possession; that the statute did not operate upon the interest here asserted by reason of her possession, and that it is beside the case to say that the statute

> has barred her right to a deed. The equitable estate of appellant in the land after the period of redemption had expired arose, not out of the certificate of purchase, which amounted to no more than evidence of her bid and when the period of redemption would expire, but by reason of her bid, the application thereof upon the decree, and the fact that the appellee failed to redeem, and her possession."

Some of the respects, in which the rulings of the Supreme Court of Illinois in this case upon the law of mortgage as here applied (if the decision is not to be regarded as based altogether upon the act of 1872), deprive plaintiff in error of the protection of the law of her contract, appear from what we have before stated. We here summarize some of them:

(1) It was the law of this mortgage contract and a rule of property, as settled by the uniform decision of the Supreme Court prior to the decisions in this litigation, that a statute of limitations does not run against a possessor of real estate; and that such a statute is not available for attack, unless the person claiming the benefit thereof has been in possession thereunder after the bar has become absolute, and has then been disseised by the paramount owner. We have already cited a number of these authorities. Under them plaintiff in error was entitled to be protected in her possession.

In the case at bar the decision takes away and denies her this protection, and holds that such a statute may be used to oust plaintiff in error of her possession in ejectment, although the defendant in error has never been in possession of the premises.

(2) Under the law, which became a part of this mortgage, the legal title of the premises was in the grantee

therein, Johnson, as trustee. This legal title was not destroyed or affected by the sale under the foreclosure decree, and the mortgagor was not revested with the legal title upon or by the entry of the decree or the sale thereunder. *Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327; *Wedgbury* v. *Cassell*, 164 Ill., 622 (626); *Williams* v. *Brunton*, 3 Gilm., 622; *Kruse* v. *Scripps*, 11 Ill., 104; *Farrar* v. *Payne*, 73 Ill., 88; *Brobst* v. *Brock*, 10 Wall., 530; Jones on Mortgages, Sec. 660. The effect of the decisions in this litigation, on the other hand, is that upon the sale the legal title in the mortgage was divested, and vested in the mortgagor McCune or his grantee Prettyman.

(3) Under the law of this mortgage contract, the equity or right of redemption in the mortgagor McCune or Prettyman was absolutely barred when the time for redemption was allowed to expire without any redemption. But according to the decision of the Supreme Court of Illinois in this case, not only did such right of redemption not expire, but it was changed into the legal estate in fee and became an estate in fee simple absolute, without any redemption or payment whatever, upon the failure of plaintiff in error in possession to take out a master's deed.

(4) By the law, which was a part of this contract, the equitable estate of the purchaser at foreclosure sale, upon the expiration of the time for redemption, was complete and absolute, and when carried out by actual, peaceable and adverse possession, was as efficient, without any master's deed, as with the master's deed. But according to the rule of decision in this case, such estate is destroyed, and it is held that plaintiff in error, without such master's deed, has no estate or right to maintain her possession; and the State of Illinois, by its judgment in ejectment

and the writ of the people of the state to be issued in such ejectment suit is, unless this court shall intervene and reverse the rulings of the state court, about to deprive the plaintiff in error of her property.

With great respect we suggest that the decisions of the Supreme Court of Illinois, relied upon by that court for its rule of decision herein (*Smith* v. *Smith*, 32 Ill., 198; *Seligman* v. *Laubheimer*, 58 Ill., 124; *Ogle* v. *Koerner*, 140 Ill., 170, and *Davis* v. *Dale*, 150 Ill., 239), have been misconceived by the court. We submit that they have no application to this case, or to any question arising upon its facts. The only point decided in *Smith* v. *Smith*, *supra*, was that in a decree of foreclosure the lower court erred in decreeing that, in the event of the sale under the decree, notes not due should be paid out of the proceeds; and in its opinion the court incidently remarked that if the party should sell or foreclose for the amount due according to the terms of the mortgage, "this of necessity would be a release of the security for the amount not due." Plainly that case has no bearing upon the question of the rights of the parties here.

In *Seligman* v. *Laubheimer*, *supra*, the point of decision was that a second mortgage, seeking to redeem, under the statute, from a sale under a decree of foreclosure of an elder mortgage than his own, could do so by paying the amount bid at such sale with interest, and that the holder of the prior mortgage could not afterwards resell the land to pay a deficiency. In that case, after such redemption, the holder of the prior mortgage who had purchased at the sale under his decree for less than the indebtedness found due, applied to the court for a resale of the property to pay the deficiency, on the theory that his mortgage lien was still subsisting, even as against the

second mortgagee, who had redeemed from the prior sale. But as such right of redemption was governed by the statute, and the second mortgagee, having redeemed in strict accordance with the statute, it was held he was entitled to the benefits of his redemption; otherwise, the right of a grantee to redeem is the merest delusion—a trap for the unwary; and that his redemption was not equivalent to a redemption by the mortgagor and did not restore the parties to their position before the sale. It was for the purpose of the facts of that case that the language of the court in its opinion was used; and it can have no application to the questions here involved as to the rights of the parties after the period for redemption has expired without any redemption. Of the cases so cited, those are the only cases which were decided before the mortgage in question was made. But the case of *Ogle* v. *Koerner* and *Davis* v. *Dale* have no better application. The question and rulings in *Ogle* v. *Koerner* was substantially the same as in *Seligman* v. *Laubheimer*. In *Davis* v. *Dale* the ruling was that when the mortgaged premises were bid off by the mortgagee, at the foreclosure sale, for the full amount of the decree, interest and costs, the owner of the equity of redemption, and not such purchaser, is entitled to the possession and rents during the period allowed for redemption; and that in any event, if held by a receiver, the possession and receipt of rents by the receiver would be for the benefit of the person entitled to the same. In *Bogardus* v. *Moses*, 181 Ill., 554 (559, 560), the same rule was again held to be applicable in a case where the sale brought the full amount of the decree, but it was recognized (p. 560) that a different rule would be applicable if the sale was for a less amount and there were a deficiency, as was the fact in the case at bar.

> has barred her right to a deed. The equitable estate of appellant in the land after the period of redemption had expired arose, not out of the certificate of purchase, which amounted to no more than evidence of her bid and when the period of redemption would expire, but by reason of her bid, the application thereof upon the decree, and the fact that the appellee failed to redeem, and her possession."

Some of the respects, in which the rulings of the Supreme Court of Illinois in this case upon the law of mortgage as here applied (if the decision is not to be regarded as based altogether upon the act of 1872), deprive plaintiff in error of the protection of the law of her contract, appear from what we have before stated. We here summarize some of them:

(1) It was the law of this mortgage contract and a rule of property, as settled by the uniform decision of the Supreme Court prior to the decisions in this litigation, that a statute of limitations does not run against a possessor of real estate; and that such a statute is not available for attack, unless the person claiming the benefit thereof has been in possession thereunder after the bar has become absolute, and has then been disseised by the paramount owner. We have already cited a number of these authorities. Under them plaintiff in error was entitled to be protected in her possession.

In the case at bar the decision takes away and denies her this protection, and holds that such a statute may be used to oust plaintiff in error of her possession in ejectment, although the defendant in error has never been in possession of the premises.

(2) Under the law, which became a part of this mortgage, the legal title of the premises was in the grantee

therein, Johnson, as trustee. This legal title was not destroyed or affected by the sale under the foreclosure decree, and the mortgagor was not revested with the legal title upon or by the entry of the decree or the sale thereunder. *Stephens* v. *Illinois Mutual Ins. Co.*, 43 Ill., 327; *Wedgbury* v. *Cassell*, 164 Ill., 622 (626); *Williams* v. *Brunton*, 3 Gilm., 622; *Kruse* v. *Scripps*, 11 Ill., 104; *Farrar* v. *Payne*, 73 Ill., 88; *Brobst* v. *Brock*, 10 Wall., 530; Jones on Mortgages, Sec. 660. The effect of the decisions in this litigation, on the other hand, is that upon the sale the legal title in the mortgage was divested, and vested in the mortgagor McCune or his grantee Prettyman.

(3) Under the law of this mortgage contract, the equity or right of redemption in the mortgagor McCune or Prettyman was absolutely barred when the time for redemption was allowed to expire without any redemption. But according to the decision of the Supreme Court of Illinois in this case, not only did such right of redemption not expire, but it was changed into the legal estate in fee and became an estate in fee simple absolute, without any redemption or payment whatever, upon the failure of plaintiff in error in possession to take out a master's deed.

(4) By the law, which was a part of this contract, the equitable estate of the purchaser at foreclosure sale, upon the expiration of the time for redemption, was complete and absolute, and when carried out by actual, peaceable and adverse possession, was as efficient, without any master's deed, as with the master's deed. But according to the rule of decision in this case, such estate is destroyed, and it is held that plaintiff in error, without such master's deed, has no estate or right to maintain her possession; and the State of Illinois, by its judgment in ejectment

and the writ of the people of the state to be issued in such ejectment suit is, unless this court shall intervene and reverse the rulings of the state court, about to deprive the plaintiff in error of her property.

With great respect we suggest that the decisions of the Supreme Court of Illinois, relied upon by that court for its rule of decision herein (*Smith* v. *Smith*, 32 Ill., 198; *Seligman* v. *Laubheimer*, 58 Ill., 124; *Ogle* v. *Koerner*, 140 Ill., 170, and *Davis* v. *Dale*, 150 Ill., 239), have been misconceived by the court. We submit that they have no application to this case, or to any question arising upon its facts. The only point decided in *Smith* v. *Smith*, *supra*, was that in a decree of foreclosure the lower court erred in decreeing that, in the event of the sale under the decree, notes not due should be paid out of the proceeds; and in its opinion the court incidently remarked that if the party should sell or foreclose for the amount due according to the terms of the mortgage, "this of necessity would be a release of the security for the amount not due." Plainly that case has no bearing upon the question of the rights of the parties here.

In *Seligman* v. *Laubheimer*, *supra*, the point of decision was that a second mortgage, seeking to redeem, under the statute, from a sale under a decree of foreclosure of an elder mortgage than his own, could do so by paying the amount bid at such sale with interest, and that the holder of the prior mortgage could not afterwards resell the land to pay a deficiency. In that case, after such redemption, the holder of the prior mortgage who had purchased at the sale under his decree for less than the indebtedness found due, applied to the court for a resale of the property to pay the deficiency, on the theory that his mortgage lien was still subsisting, even as against the

second mortgagee, who had redeemed from the prior sale. But as such right of redemption was governed by the statute, and the second mortgagee, having redeemed in strict accordance with the statute, it was held he was entitled to the benefits of his redemption; otherwise, the right of a grantee to redeem is the merest delusion—a trap for the unwary; and that his redemption was not equivalent to a redemption by the mortgagor and did not restore the parties to their position before the sale. It was for the purpose of the facts of that case that the language of the court in its opinion was used; and it can have no application to the questions here involved as to the rights of the parties after the period for redemption has expired without any redemption. Of the cases so cited, those are the only cases which were decided before the mortgage in question was made. But the case of *Ogle* v. *Koerner* and *Davis* v. *Dale* have no better application. The question and rulings in *Ogle* v. *Koerner* was substantially the same as in *Seligman* v. *Laubheimer*. In *Davis* v. *Dale* the ruling was that when the mortgaged premises were bid off by the mortgagee, at the foreclosure sale, for the full amount of the decree, interest and costs, the owner of the equity of redemption, and not such purchaser, is entitled to the possession and rents during the period allowed for redemption; and that in any event, if held by a receiver, the possession and receipt of rents by the receiver would be for the benefit of the person entitled to the same. In *Bogardus* v. *Moses*, 181 Ill., 554 (559, 560), the same rule was again held to be applicable in a case where the sale brought the full amount of the decree, but it was recognized (p. 560) that a different rule would be applicable if the sale was for a less amount and there were a deficiency, as was the fact in the case at bar.

(5) Since 1835 the following statute has been the law of Illinois:

> "Action brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire such title after taking such possession the limitation shall begin to run from the time of acquiring title." (Rev. Stat. Ill., Ch. 83, Sec. 4; 2 Starr & Curtis Stat., p. 2604.)

Upon the expiration of the period for redemption here, plaintiff in error had a connected title in equity deducible of record from the United States, and from a public officer (Master in Chancery) authorized by the laws of Illinois to sell such land under decree of a court of record. She was possessed of such land, by actual residence of her tenants thereon, for seven successive years and upwards prior to the commencement of the ejectment suits referred to in her bill of complaint herein. These facts constituted a perfect bar to the defendant in error's ejectment suits, under said statute of 1835, as the same was construed and applied by the uniform decisions thereunder, prior to the decisions of the Supreme Court of Illinois in this litigation. *Irving* v. *Brownell*, 11 Ill., 402; *Collins* v. *Smith*, 18 Ill., 160; *Martin* v. *Judd*, 81 Ill., 488; *Gregg* v. *Tesson*, 1 Black, 150; *Dredge* v. *Forsyth*, 2 Black, 563; *Dolton* v. *Cain*, 14 Wall., 472. But the bill of complaint herein shows that unless the judgment of the Supreme Court of Illinois be reversed and her bill of

complaint against defendant in error sustained, the State of Illinois, by the judgment in ejectment in the suits of defendant in error here in question, and by its writ therein, will deprive plaintiff in error of her said property without any compensation and without due process of law.

IV.

IF SAID STATUTE OF 1872 BE HELD CONSTITUTIONAL WHEN CONSTRUED AS APPLICABLE TO AFFECT THE RIGHTS OF PLAINTIFF IN ERROR OR AS VESTING DEFENDANT IN ERROR WITH TITLE, OR BE GIVEN A CONSTRUCTION CONSISTENT WITH THE FEDERAL CONSTITUTION, PLAINTIFF IN ERROR CAN MAINTAIN HER BILL; AND THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS AND THE DECREE OF THE CIRCUIT COURT OF FULTON COUNTY SHOULD BE REVERSED.

The Supreme Court of Illinois has affirmed the decree of the Circuit Court, dismissing the bill for want of equity. As they construe and apply this statute, all title of plaintiff in error ceased when she failed to take a master's deed; and the title of defendant in error was revested. She has neither legal nor equitable title; and he has both, because such is the effect of the act of 1872.

But if this court holds with us upon the constitutional questions, the deed to defendant in error received from Prettyman, and his claim of title thereunder, is a mere cloud upon the title of plaintiff in error, and her title is complete. It will not be affected either by the statute or the decision of said court, but will remain as determined by the law of Illinois at the date of the mortgage contract.

What that law was has already been considered. We

are content to adopt the statement by Justice Hand of the law upon this point and its effect upon the title of the parties so far as this case is concerned, to wit (Trans., p. 76):

> "It seems clear that the equitable estate in said lands vested in the appellant immediately upon the expiration of the time allowed for redemption, the naked legal title thereof being in the grantor of appellee. On this title he could maintain ejectment against the appellant, and in case she brought ejectment against him he could defeat her. She, however, at the time his equity of redemption expired, and for many years prior thereto, had been in possession of the land. Whether that possession during the period of redemption was so far acquiesced in by the grantor of the appellee as to have made it lawful need not be considered, although at this distant time her possession with his consent might be presumed, but after that period had expired in equity it is clear she was entitled to possession. At least, she being the equitable owner of the estate and in possession, it was not inequitable that she should retain possession as against Prettyman or his grantee, who only had the naked legal title."

If plaintiff in error has an equitable title, a court of equity will enjoin proceedings at law and direct the cause to proceed in equity.

Mills v. *Lockwood*, 42 Ill., 111, is an illustration of this principle, and the case is in many respects like the case at bar.

Cephas Mills had deeded the lands in question to one Biers, through whom Lockwood claimed, but an error had been made in the description. Possession had been given of the land and Lockwood held possession. Ejectment was brought by parties claiming under Cephas Mills subsequently to his deed to Biers. Lockwood endeavored to make title by tax deed, by limitation and by adminis-

trator's sale upon claim filed against the estate of Cephas Mills. All of these defenses proved defective and judgment was finally secured against him. Taking a new trial under the statutes of Illinois, by which the final judgment was vacated, he filed his bill in equity for injunction against said ejectment proceedings and for reformation of deed. The bill was sustained and the relief granted. Upon the question of laches in applying to a court of equity the court said:

> "On the point of laches, in not resorting to this remedy at an earlier period, the answer is, the statute of limitations has not run against the complainant, and he has been, all the time since his purchase, in the peaceable possession of the lands. He was in no position to act; he could only be quiet, awaiting the attack of those who supposed they had paramount title. In such case, the lapse of time is not material. So soon as the heirs at law of Cephas Mills brought their action of ejectment, and recovered a verdict, then complainant filed this bill alleging the mistake and seeking to correct it. He had no motive to move before he was molested. If there be any laches, is it not rather imputable to the heirs, who slumbered on their rights, if they had any, so many years? It is not understood that a statute of limitations, or rule of limitation in equity, runs against a possessor of real estate, but it runs against him who is out of possession. *Barbour* v. *Whitlock*, 4 Monroe, 197."

In *Wilson* v. *Byers*, 77 Ill., 76, the land had been entered by David Rawlings, but there was a mistake in the certificate by which the range read south instead of north. After having been in possession of the patentee and his assigns for many years the land was platted as an addition to the City of Olney. Then Wilson procured a patent from the government by a correct description and made claim to the property. Byers *et al.* filed a bill in equity for relief and removal of cloud and for a convey-

ance to them by Wilson. The relief was granted, the court saying, in part:

> "It is insisted, too, that there has been such laches as should bar the claim for relief.
>
> Laches cannot be imputed to one in the peaceable possession of land, for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. *Mills* v. *Lockwood*, 42 Ill., 112. The possession is notice to all, of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.
>
> The tract was purchased by Wilson, with 'Porterfield' scrip, which was worth $5 per acre, because applicable to unoffered lands; and it is insisted that it was erroneous to compel Wilson to convey to complainants the rights held by him under this scrip; that it was an appropriation of this scrip to complainants' use without consideration. But Wilson purchased the land with notice and in consequent fraud of the rights of the complainants or their grantor, and held the title which he acquired, but as their trustee.
>
> Whatever the sum he might have paid for the land, it would in no wise affect complainants' right to a conveyance of the legal title."

Still more like the case at bar was *Ruckman* v. *Cory*, 129 U. S., 387. Bowers executed to Corey his bond for a deed for lands in Mason County, Illinois, and Corey went into possession, and made extensive improvements. Bowers conveyed the land to Ruckman, a cousin of Corey's, at the latter's request. Ruckman deeded the land to a woman whom he afterwards married. Later the woman secured a divorce, and then brought ejectment against Corey, and recovered. Corey took a new trial as a matter of right under the Illinois statutes, and filed his bill in equity for injunction, relief and conveyance. It appeared that Corey had owed Ruckman at the

time the deed to him was made, but had subsequently paid the debt. The deed to the woman was voluntary.

The relief was granted, including an order on Mrs. Ruckman to convey the legal title to Corey.

We quote from the opinion:

"1. The contention that the plaintiff has a plain, adequate and complete remedy at law cannot be sustained. It is not certain that he can successfully defend the action of ejectment. Besides, only a court of equity can compel the surrender of the legal title held by the defendant and invest the plaintiff with it.

2. Nor has the plaintiff been guilty of any such laches as would close the doors of a court of equity against him. He was in the peaceful occupancy of the premises for some years prior to any assertion of title upon the part of the defendant under the deed of 1872. If he had not been all the time in the possession of the premises, controlling them as if he were absolute owner, the question of laches might be a more serious one for him than it is. The bringing of the action of ejectment was, so far as the record shows, the first notice he had of the necessity of legal proceedings for his protection against the legal title held by the defendant. As proceedings to that end were not unreasonably delayed, we do not perceive that laches can be imputed to him. Laches are rather to be imputed to the defendant, who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff until the ejectment suit was instituted. *Mills* v. *Lockwood*, 42 Illinois, 111, 118. 'Laches,' the Supreme Court of Illinois has well said, 'cannot be imputed to one in the peaceable possession of land for delay in resorting to a court of equity to correct a mistake in the description of the premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so.' *Wilson* v. *Byers*, 77 Ill., 76, 84. See, also, *Barbour* v. *Whit-*

lock, 4 T. B. Mon., 180, 195; *May's Heirs* v. *Fenton,* 7 J. J. Marsh., 306, 309."

Many decisions to the same effect in the several state Supreme Courts and in this court are cited in our brief. But the case of *Ruckman* v. *Cory, supra,* seems to us to be a precedent for the relief prayed in our bill. Only in this court of equity can plaintiff in error be afforded complete relief. The defendant in error holds as a volunteer with full notice of plaintiff in error's rights, and, as the bill alleges, without actual consideration. He should not only be enjoined from prosecuting said ejectment cases, but compelled to convey to plaintiff in error in order to perfect her title.

We ask that the judgment of the Supreme Court of Illinois affirming the decree of the Circuit Court of Fulton county dismissing her bill, and the last mentioned decree, be reversed, and that the cause be remanded to the Circuit Court of Fulton County.

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For Plaintiff in Error.